Mohd Shafiee bin Arshad & Anor v District Officer Sibu

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO SBW-24–12 OF 3 OF 2020
CHRISTOPHER CHIN JC
6 APRIL 2021

Administrative law — Exercise of administrative powers — Application to amend name of child — Applicants sought to delete 'bin Abdullah' in adoptive child's names — Whether application should have been initiated via judicial review — Whether civil courts had jurisdiction to hear a matter involving Muslim family — Whether fatwa may have binding and retrospective effect — What were factors in determining child's best interest

The applicants had adopted Child A bin Abdullah ('the child') on 16 November 2018 at the District Office Sibu. After the adoption, a birth certificate for the child was issued. It was then that the applicants realised their alleged 'oversight' that the child's name was with 'bin Abdullah' was retained in the birth certificate. It was their intention that the child be named Child A and not Child A bin Abdullah. The child's original name prior to adoption was Child A bin Abdullah. Hence, the present originating summons sought to delete the 'bin Abdullah' from the child's name and all official records. The application was made ex parte where the judge then ordered that papers to be served to the appropriate authorities. The respondent then intervened and submitted that: (a) there was no mistake or error in the special register and that the certificate of adoption and the birth certificate, stating that the respondent had made the decision to name the child as such in accordance with the 'Garis Panduan Penaamaan (Bin/Binti) Anak Tak Sah Taraf, Anak Angkat dan Saudara Kita' issued by the Sarawak Mufti; and (b) the applicants' should have filed a judicial review to challenge the decision made by the respondent on naming the adopted child. The court also invited the Advocates Association of Sarawak as amicus curiae to assist the court. The issues to be determined were: (i) whether the civil court had jurisdiction to hear an application involving a Muslim family; (ii) the effect of initiating the proceeding other than by judicial review; (iii) the binding and retrospective effect of fatwa on the applicants; and (iv) what was in the best interest of the child.

Held, allowing the application:

(1) Based on s 2(2) of the Adoption Ordinance (Cap 91), it was the clear intention of the Legislature that a child, after adoption, should for all intents and purposes be indistinguishable from a child born in wedlock and cared for by his biological parents (see para 12).

(2) The court was in agreement with the applicants' counsel in her submission in reply that the present case concerned the name of an adopted child and not legitimising an illegitimate child and/or the name of an illegitimate child. The applicants were not seeking to change the legitimacy status of the adoption, but to sought for the court's assistance to delete 'bin Abdullah' in the name of the child in the special register, the certificate of adoption and in the birth certificate of the child (see para 14).

(3) The civil courts had jurisdiction to hear the matter as the registration of an adopted child arising from the Federal List which the civil court had jurisdiction over and that the matter did not fall under the purview of the Syariah Court. Thus art 121(1A) of the Federal Constitution empowered a civil court to hear the application (see para 20).

(4) The applicants had commenced these proceedings by way of originating summons supported by affidavits. All parties were duly served with relevant papers. The affidavit evidence and submissions involved in an originating summons and an application for judicial reviews were substantially the same. The court found that procedural irregularity would not cause the likelihood of parties being prejudiced throughout the proceedings. The court should be more concerned with administering justice for the litigants coming before this court (see para 30).

(5) The court could adjudicate on the matter without due concern of the manner of how these proceedings were commenced or without having to decide whether to dismiss this case purely on the mode of the proceedings by the applicants. This was so that the proper merits of each party could be canvassed by them respectively and fairly for this court's adjudication for justice is served. Therefore, the court ruled that the current application may be treated as an application of judicial review without undue delay (see para 33).

(6) Having read the Majlis Islam Ordinance (Cap 41) as a whole, nothing suggested that the Majlis was empowered to issue a fatwa with retrospective effect. Hence, the recently *gazetted* fatwa, could not be said to have retrospective effect. The *gazetted* fatwa should and would only bind the naming of an illegitimate child for an application after the *gazetted* fatwa had come into force. Therefore, the respondent has erred in enforcing the *ungazetted* fatwa by adding 'bin Abdullah' to the child's name by reason of his adoption (see paras 46 & 48–49).

(7) In determining what was the, 'best interests of the child' in this case, the interest of the child must be looked at in the circumstances of each case in particular, as in this case, the child's future upbringing in an Islamic household. The strongest and clearest expression of what is the child's

best interest was the intention expressed by the child's parents. They have expressed this intention in this application as parents, they have the first right to decide what was in the best interest of the child. This was so as they are now both legally and morally responsible for this child and his welfare, emotions, health, education and generally, his upbringing (see paras 56–57).

(8) It is well established in Malaysia that the best interest of the child should prevail in cases such as this and a child should not be punished for the choice of his parents whether biological or adoptive. It was not in the best interest of the child to grow up, go to school, socialise and work carrying a stigma that he was either illegitimate or adopted. Such a label would deprive him of his fundamental right of being equal in the eyes of the law under art 8(1) of the Federal Constitution. While the decision of the respondent was not tainted with illegality, mistake nor was that any error of judgement or discretion, this case is decided on the overriding principle of the best interest of the child as perceived by his parents. Therefore the child should be named as intended by his parents (see paras 63–64 & 66).

[Bahasa Malaysia summary

Pengadu telah mengambil Child A bin Abdullah ('kanak-kanak tersebut') sebagai anak angkat pada 16 November 2018 di Pejabat Daerah Sibu. Selepas pengambilan anak angkat tersebut, sijil lahir untuk kanak-kanak tersebut telah dikeluarkan. Adalah pada waktu itu, pemohon sedar bahawa mereka telah terlepas pandang bahawa nama kanak-kanak tersebut telah kekal dengan 'bin Abdullah' dalam sijil lahir tersebut. Adalah merupakan niat mereka bahawa kanak-kanak tersebut dinamakan Child A dan bukannya Child A bin Abdullah. Nama asal kanak-kanak tersebut sebelum diambil sebagai anak angkat adalah Child A bin Abdullah. Oleh yang demikian, saman pemulu iini memohon untuk mengeluarkan 'bin Abdullah' daripada nama kanak-kanak tersebut dan semua rekod rasmi. Permohonan ini dibuat ex parte, yang mana Hakim pada waktu tersebut telah memerintahkan bahawa kertas kausa diserahkan kepada pihak berkuasa yang berkaitan. Responden telah kemudiannya mencelah dan menghujahkan bahawa: (a) tiada kesalahan atau kesilapan dalam daftar khas dan bahawa sijil pengambilan anak angkat dan sijil lahir, yang meyatakan bahawa responden telah membuat keputusan untuk menamakan kanak-kanak tersebut berdasarkan Garis Panduan Penamaan (Bin/Binti) Anak Tak Sah Taraf, Anak Angkat dan Saudara Kita yang dikeluarkan oleh Mufti Sarawak; dan (b) pemohon sepatutunya memfailkan permohonan semakan kehakiman untuk mecabar keputuasan yang dibuat oleh responden dalam menamakan kanak-kanak tersebut. Mahkamah juga menjemput Advocates Association of Sarawak sebagai amicus curiae untuk membantuk mahkamah. Isu untuk diputuskan adalah: (i) sama ada mahkamah sivil mempunyai bidangkuasa untuk mendengar permohonan

berkaitan dengan keluarga islam; (ii) kesan memulakan prosiding selain daripada semakan kehakiman; (iii) kesan mengikat dan berkebelakang fatwa terhadap pemohon; dan (iv) apa yang merupakan dalam kepentingan kanak-kanak tersebut.

Diputuskan, membenarkan permohonan:

(1) Berdasarkan s 2(2) Ordinan Pengambilan Anak Angkat (Cap 91) adalah menjadi niat jelas badan perundangan bahawa seorang kanak-kanak, selepas diambil sebagai anak angkat, sepatutunya pada semua niat dan tujuan tidak boleh dibezakan dengan kanak-kanak yang lahir diluar nikah dan dijaga oleh ibu bapa biologinya (lihat perenggan 12).

(2) Mahkamah bersetuju dengan hujahan balas peguam pemohon bahawa kes ini berkaitan dengan nama seorang anak angkat dan bukannya mengesahkan satu anak yang tidak sah dan atau nama seorang anak yang tidak sah. Pemohon tidak cuba untuk mengubah kesahhan pengambilan anak angkat tersebut, tetapi memohon bantuan mahkamah untuk mengeluarkan 'bin Abdullah' daripada nama kanak-kanak tersebut dari daftar khas, sijil pengambilan anak angkat dan sijil lahir kanak-kanak tersebut (lihat perenggan 14).

(3) Mahkaamh sivil mempunyai bidang kuasa untuk mendengar perkara tersebut kerana pendaftaran seorang anak angkat timbul dari senarai persekutuan yang mana Mahkamah Sivil mempunyai bidang kuasa dan perkara tersebut tidak jatuh dibawah bidangkuasa mahkamah syariah. Oleh yang demikian perkara 121(1A) Perlembagaan Persekutuan memberi kuasa kepada mahkamah sivil untuk mendengar permohonan tersebut (lihat perenggan 20).

(4) Pemohonan telah memulakan prosiding tersebut melalui satu saman pemula yang disokong dengan afidavit. Semua pihak telah diserahkan dengan kertas kausa yang berkaitan. Keterangan afidavit dan hujahan berkaitan dengan satu saman pemula dan satu permohonan untuk semakan kehakiman adalah kebanyakannya sama. Mahkamah mendapati bahawa satu ketidakseragaman prosedur tidak akan menyebabkan pihak-pihak terprejudis sepanjang prosiding. Mahkamah sepatutnya lebih mementingkan memberikan keadilan kepada litigan yang hadir dihadapan mahkamah ini (lihat perenggan 30).

(5) Mahkamah boleh mengadili perkara tersebut tanpa bimbang akan cara bagaimana prosiding ini dimulakan atau tanpa perlu memutuskan sama ada untuk mengetepikan kes ini hanya berdasarkan cara prosiding oleh pemohon. Ini adalah supaya merit setiap kes boleh diteliti oleh mereka dan secara adil agar pengadilian mahkamah ini untuk keadilan tercapai. Oleh yang demikian, mahkamah memutuskan bahawa permohonan ini

boleh diterima sebagai permohonan semakan kehakiman tanpa apa-apa penangguhan (lihat perenggan 33).

(6) Setelah membaca Ordinan Majlis Islam (Cap 41) secara keseluruhannya, tiada apa-apa yang mencadangkan bahawa Majlis diberikuasa untuk mengeluarkan satu fatwa yang mempunyai kesan kebelakang. Oleh itu, fatwa yang baru *diwartakan* tidak boleh dikatakan mempunyai kesan kebelakang. Fatwa yang *diwartakan* septutnya dan hanya akan mengikat penamaan seorang anak tidak sah taraf untuk permohonan selepas fata yang *diwartakan* mula berkuatkuasa. Oleh yang demikian, responden telah terkhilaf dalam menguatkuasakan fatwa yang belum *diwartakan* dengan menambah 'bin Abdullah' kepada nama anak tersebut atas sebab pengambilannya sebagai anak angkat (lihat perenggan 46 & 48–49).

(7) Dalam menentukan apa yang merupakan dalam kepentingan kanak-kanak tersebut dalam kes ini, kepentingan kanak-kanak tersebut mestilah diteliti dalam keadaan setiap kes, dan dalam kes ini, masa depan kanak-kanak tersebut dalam satu keluarga islam, ekspresi yang paling jelas mengenai apa yang berada dalam kepentingan kanak-kanak tersebut dalah niat yang dizahirkan oleh ibu bapanya. Mereka telah menzahirkan niat mrakan dalam permohonan ini sebagai ibu bapa. Ini adalah supaya kerana sekarang mereka mempunyai hak untuk menentukan kepentingan kanak-kanak tersebut. Ia adalah kerana mereka sekarang mempunyai tangungjawab undang-undang dan moral terhadap kanak-kanak tersebut dan kebajikannya, emosi, kesihatan, pendidikan dan secara amnya didikannya (lihat perenggan 56–57).

(8) Adalah merupakan perkara yang mantap Malaysia bahawa kepentingan kanak-kanak tersebut mengatasi dalam kes sedemikian dan kanak-kanak tersebut tidak sepatutnya dihukum untuk pilihan ibu bapanya sama ada secara biologi atau yang mengambilnya sebagai anak-angkat. Ianya bukan dalam kepentingan kanak-kanak tersebut untuk membesar, pergi kesekolah, bersosial dan berkerja dengan stigma bahawa dia adalah sama ada seorang anak tidak sah atau anak angkat. Label sedemikian akan merampas haknya untuk kesamaan di mata undang-udnang dibawah perkara 8(1) Perlembagaan Persekutuan walaupun keputusan responden bukanlah tidak sah disisi undang-undang, merupakan satu kesilapan atau wujud apa-apa penggunaan budi bicara yang salah, kes ini diputuskan atas prinsip kepentingan kanak-kanak tersebut sepertimana yang dilihat oleh ibu bapanya. Oleh yang demikian kanak-kanak tersebut sepatutnya dinamakan sepertimana yang diinginkan oleh ibu bapanya (lihat perenggan 63–64 & 66).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Amirthahayaki Kumarasamy v Lembaga Kelayakan Profesion Undang-Undang, Malaysia (Legal Profession Qualifying Board, Malaysia) [2010] 1 MLJ 656, CA (refd)

Hong Yik Plastics (M) Sdn Bhd v Ho Shen Lee (M) Sdn Bhd & Anor [2020] 1 MLJ 743; [2019] MLJU 1386, CA (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)

Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323, FC (refd)

Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311; [2020] 1 CLJ 193, FC (refd)

Jabatan Pendaftaran Negara & Ors v Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (intervener) [2020] 2 MLJ 277, FC (refd)

Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

Noorfadila bt Ahmad Saikin v Chayed bin Basirun & Oors [2012] 1 MLJ 832, HC (refd)

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)

Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated [2004] 2 MLJ 49, CA (refd)

Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 181, FC (refd)

Thivya Nair Chandran & Anor v Pusphalatha Surandran & Anor [2015] 2 CLJ 408, HC (refd)

Legislation referred to

Adoption Ordinance (Cap 91) s 2(2), 4(4), (4)(a), (4)(b), 5(1)(i)

Administration of the Religion of Islam (State of Johor) Enactment 2003 ss 48, 49

Child Act 2001

Federal Constitution arts 8(1), 74(2), 121(1A), Ninth Schedule, Lists I, II, item 12(a)

Majlis Islam Ordinance (Cap 41) s 37, 37(4), (5)

Rules of Court 2012 O 1A, O 5 r 4

Belinda Hii (Hii & Hii Advocates) for the applicants.

Hisyamuddin bin Roslan (Senior Legal Officer, Sarawak State Attorney-General's Chambers) for the respondent.

Wee Wui Kiat (Battenberg & Talma); Benny Zaidi (Jacquelyn Hii with him) (Advocates Association of Sarawak) as amicus curiae.

Christopher Chin JC:

INTRODUCTION

[1] The applicants adopted Child A bin Abdullah ('the child') on the 16 November 2018 at the District Office Sibu under Certificate of Adoption reference No 92/Sibu/2018 dated 16 November 2018.

[2] After the adoption, a birth certificate for the child was issued under reference No NN 1028/2018.

[3] It was then the applicants realised their alleged 'oversight' that the child's name with 'Bin Abdullah' was retained in the birth certificate. It was their intention that the child should be named as:

> CHILD A; and not:
>
> CHILD A BIN ABDULLAH, that is, with the words, 'Bin Abdullah' omitted.

[4] The child's original registered name prior to the adoption by the applicants was, CHILD A BIN ABDULLAH. Hence the present originating summons in encl 1 seeking to delete the 'Bin Abdullah' for the child's name in all official records.

[5] The application was made ex parte by way of originating summons. On the 9 June 2020 this court then presided by YA Dr Lim Hock Leng ordered, inter alia:

> The papers are to be served on the appropriate authorities. Whether or not the applicants choose to put in a supplementary affidavit to include the evidence that the applicants had inquired of the Jab Pendaftaran to which it was said to have no objection, I leave it to the applicants but the Court cannot act on evidence from the bar.

Hence, on the 28 August 2020, the papers were served on the District Officer, Sibu and the Pengarah Pendaftaran Negara, Jabatan Pendaftaran Negara, Negeri Sarawak.

[6] On 26 November 2020, the District Officer of Sibu ('the respondent') intervened and opposed to the application. The respondent submitted that there was no mistake or error in the special register, the Certificate of Adoption and the Birth Certificate, stating that the respondent had made the decision to name the child as such in accordance with the *Garis Panduan Penamaan (Bin/Binti) Anak Tak Sah Taraf, Anak Angkat Dan Saudara Kita* issued by the *Jabatan Mufti Negeri Sarawak*. Further, that the applicants should have

commenced the action by way of judicial review to challenge the decision made by the respondent on the naming of the adopted child.

[7] As this case, firstly, attracted public interest locally; secondly being aware that Sarawakians' perception and interpretation of law is somewhat unique within Federation and; thirdly, the welfare of the child (a minor) was involved, I then proceeded to invite the Advocates Association of Sarawak (AAS) as amicus curiae to assist me by giving the court an independent view of the law.

[8] Hence, at the outset, I wish to express my immense gratitude to the AAS for immediately mobilising their members, particularly from their Syariah Sub-Committee to file into court their views at somewhat short notice. I am indebted to them for their input in this matter. By their participation they have fulfilled the primary and noble objective of their association.

ISSUES TO BE DECIDED

[9] Based on the papers filed, the issues to be dealt with by this court are as follows:

(a) whether the civil court has jurisdiction to hear this application involving a Muslim family;

(b) the effect of initiating the proceeding other than by judicial review;

(c) the binding and retrospective effect of *fatwa* on the applicants; and

(d) what is in the best interest of the child.

KEY PROVISIONS IN THE ADOPTION ORDINANCE (CAP 91) OF SARAWAK.

[10] At the outset I am mindful of the fact that in Sarawak (and unlike in the States of Malaya as well as in Sabah) adoption is ordered through the jurisdiction of the District Office. Islamic family law is relevant because of sub-s 5(1)(i) of the Adoption Ordinance which reads:

> 5 Conditions of valid adoption
>
> (1)No adoption in Sarawak shall be registered unless an application is made for such registration in accordance with the procedure set out in section 3, and the District Officer is satisfied by evidence upon oath or otherwise —
>
> (a) ...;
>
> (h) ...; and
>
> (i) *that the adoption would not contravene the provisions of the Islamic Family Law Ordinance, 2001 [Cap 43].* (Emphasis added.)

[11] The State Legislature's overriding consideration or guiding principle in adoption cases can be seen in s 2(2) of the Adoption Ordinance (Cap 91) ('the Guiding Principle'): A

> 2(2) *Such adopted child shall stand in the same relation to the adopting parent or parents as would a child born in wedlock* and shall have all the rights and privileges of a legitimate child in respect of the obligations and estate of the adopting parents. (Emphasis added.) B

[12] By s 2(2) above it is the clear intention of the legislature that a child, after adoption, shall for all intents and purposes be indistinguishable from a child born in wedlock and cared for by his biological parents. C

[13] The applicants seek this court's interference by virtue of s 4(4) of the Adoption Ordinance (Cap 91): D

> 4(4)(a) No variation, amendment or alteration shall be made to the special register or to a certificate of adoption in respect of the registration of any adoption except in accordance with an Order made by a Judge of the High Court to rectify or correct any mistake or error found in the special register or in the certificate of adoption.

E

Whether the civil court has jurisdiction to hear this application involving a Muslim family

[14] At the outset, it is pertinent to note that the applicants are not seeking to change the legitimacy status of the adoption, but to seek for the Court's assistance to delete 'BIN ABDULLAH' in the name of the child in the special register, the certificate of adoption and in the birth certificate of the child. Hence, I am in agreement with the applicants' counsel in her submission in reply (encl 23) that the present case concerns the name of an adopted child and not legitimising an illegitimate child and/or the name of an illegitimate child. F G

[15] Article 74(2) of the Federal Constitution gives the Legislature of a State in Malaysia the authority to make laws on the matters stated in List II (State List) in the Ninth Schedule of the Federal Constitution. It is therefore by constitutional prescription that the Muslims in this country are subjected to the general law enacted by Parliament as well as Islamic laws enacted by the State Legislature. H

[16] The List II (State List) prescribes matters in relation to Islamic Law, inter alia, adoption and legitimacy. The application before the court today concerns the registration of birth and death which is an item falling under item 12(a) of the List I, the Federal List. I

[17] Tengku Maimum CJ in the recent case of *Rosliza bt Ibrahim v Kerajaan*

Negeri Selangor & Anor [2021] 2 MLJ 181, has shed light on the jurisdiction of the Syariah Court. That the Syariah Court may only exercise jurisdiction over a person or persons on two conditions:

> [78] Syariah Courts may only exercise jurisdiction over a person or persons on two conditions. Firstly, the person shall profess the religion of Islam. This can generally be classified as jurisdiction ratione personae, where the jurisdiction of the tribunal or court is contingent on the litigant's legal persona. Secondly, even if Syariah Courts may exercise jurisdiction ratione personae, they must still ensure that they have jurisdiction over the subject-matter as expressly enumerated in the said Item 1 (of the State List). This may be classified as jurisdiction ratione materiae — or subject-matter jurisdiction.

[18] On the question of whether the Civil Court has jurisdiction, reference may be made to the recent Federal Court case of *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323, where the court affirmed the position in *Semenyih Jaya* and *Indira Ghandhi,* and held at para 64 that:

> [64] ... the civil courts retain supervisory jurisdiction which is inherent in their function under arts 4(1) and 121(1) of the FC. Thus, unless theirjurisdiction is very clearly excluded by virtue of subject-matter under art 121(1A), the question that the civil superior courts have no jurisdiction to determine any form of dispute does not arise.

[19] It is noted that encl 1 (originating summons) by the applicants concerns the registration of the child's name in the register in respect of adoption and certification of adoption kept with the district officer. The religion of the child or of his adoptive parents, the legitimacy of the adoption and the procedural matters involving the adoption is not in question or in dispute at all.

[20] As this matter concerns, firstly, the registration of an adopted child arising from the Federal List in which the civil court has jurisdiction over (see paras 16–17 above); secondly, as this matter does not fall under the purview of the Syariah Court, thus art 121(1A) of the Federal Constitution empowers a civil court to hear this application I am therefore satisfied that this court has jurisdiction to adjudicate this application.

The mode of proceedings by originating summons and not by judicial review

[21] The applicants commenced this action by way of originating summons vide s 4(4)(a) and (b) of the Adoption Ordinance which reads:

> 4(4)(a) ...
>
> (b) An application for an Order under paragraph (a) —

(i) may be made by the District Officer who registers the adoption or issues the certificate or by any person named in the certificate as the natural parents or adopting parents or guardian of the child; and

(ii) *shall be by way of originating summons to a Judge in Chambers and the Rules of the High Court relating to application by originating summons shall apply thereto.* (Emphasis added)

[22] The purpose of an Originating Summons, as provided under O 5 r 4 of the Rules of Court 2012 ('the ROC') is to determine the construction and interpretation of law. A judicial review, provides a means by which judicial control of administrative action is exercised, as held in the Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145.

[23] The applicants alleges that due to an oversight on their part, 'BIN ADBULLAH' was retained in the name of the child. On the other hand, the respondent affirmed that the procedures to adopting and naming the child were fully complied with. This is not in any way disputed by the applicants.

[24] Reconciling the occurrence of events, it may be concluded that the registration of the child's name, ie insertion of 'BIN ABDULLAH' in the name of the child was done through no fault of the respondent. In other words, there exists no procedural mistake or error on the side of the respondent while registering the name of the child.

[25] AAS in particular opines that the more appropriate commencement mode of this proceedings ought to have been an application for judicial review as the applicants are seeking to enquire into the decision making process of the District Officer Sibu in including 'BIN ABDULLAH' in the child's name.

[26] Can the current originating summons be treated as if it were an application for judicial review application against the decision made by an administrative body (the respondent)?

[27] The Court of Appeal in *Amirthahayaki Kumarasamy v Lembaga Kelayakan Profesion Undang-Undang, Malaysia (Legal Profession Qualifying Board, Malaysia)* [2010] 1 MLJ 656 has held that justice of the case should prevail over technicality issues that arose in a case:

> A person or litigant should not be deprived of his/her day in court of law just on technical procedural ground like in the present case. Even if the appellant had commenced the application by way of originating summons (not by way of Form 111A as required under O 53), all the relevant facts and evidence for considerations had been forwarded to the court. No prejudice was ever occasioned to any party in

A the proceedings, including the court. To strike out the appellant's application at this stage of the proceedings (without hearing the merit) is obviously unfair to the appellant who came to court to seek justice and fair hearing.

B **[28]** In addition, this court is also aided by O 1A of the ROC which provides that regard shall be to justice. An irregularity shall not render the proceedings, any step taken in proceedings, or any documents, judgment or order therein. The court should treat the rules as a procedural code and subject to the overriding objective of enabling the court to deal with cases justly.

C **[29]** Mohtar Abdullah FCJ (as he was then) made observation in the case of *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 that:

D A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blithered fixation on technicalities of the rules and the cold letter of the law.

E **[30]** The appellants commenced these proceedings by way of originating summons supported by affidavits. All parties are duly served with relevant papers. The affidavit evidence and submissions involved in an originating summons and an application for judicial reviews are substantially the same. Essentially, the question of whether the procedural irregularity will cause the likelihood of parties being prejudiced throughout the proceedings. In this case
F the answer is in negative, hence any procedural irregularity should not nullify the present proceedings. The court should be more concerned with administering justice for the litigants coming before this court.

G **[31]** It is noted that despite its initial objection, the respondent never sought to formally nullify or object to these proceedings on the issue of the proper mode of proceedings and instead, to their credit, *took steps* to actively participate in the proceedings that followed.

H **[32]** The adversarial system of justice in Malaysia views truth to be determined through submission of two competing parties on the facts and law at hand. However, the overriding duty of a trial judge is to ensure that justice must not only be done, but also seen to be done. An observation is made with reference to maxim in the case of *Hong Yik Plastics (M) Sdn Bhd v Ho Shen Lee (M) Sdn Bhd & Anor* [2020] 1 MLJ 743; [2019] MLJU 1386 where Vernon
I Ong JCA (as he was then) held that:

[12] Under our system of adversarial trials, the only participant impartially seeking the true facts and the applicable law is the trial judge. *To achieve his purpose and objective in a just* manner and with just results, the trial judge is under a duty to see that Justice is done; by rendering to every person his due under the same law,

equally, fairly, and impartially applied and administered, without bias, without prejudice, without passion, and irrespective of race, creed, economic or social status. In this connection, the duty of the trial judge extends to the preservation of the rights of litigants and a proper disposition of the matters in dispute.

[33] Based on the above this court can adjudicate on this manner without due concern of the manner of how these proceedings were commenced or without having to decide whether to dismiss this case based purely on the mode of proceedings by the applicants. This is so that the proper merits of each party can be canvassed by them respectively and fairly for this court's adjudication for justice is served. Taking into account of the matter at hand concerning the interest of a child, I then rule that the current application may be treated as though an application of judicial review without undue delay.

The binding and retrospective effect of fatwa

[34] The respondent submitted that they relied on the *Garis Panduan Penamaan (Bin/Binti) Anak Tak Sah taraf, Anak Angkat Dan Saudara Kita* issued by Jabatan Mufti Negeri Sarawak as well as a fatwa on 'Isu Penamaan Anak Angkat for the insertion of 'BIN ABDULLAH' in the naming of the child (encl 9).

[35] The force of law of *fatwa* has been considered in the recent Federal Court case of *Jabatan Pendaftaran Negara & Ors v Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (intervener)* [2020] 2 MLJ 277 where the court held that a fatwa becomes law in the State and would be legally binding only if it is *gazetted* in the State *Gazette*. Section 49 of the Administration of the Religion of Islam (State of Johor) Enactment 2003 provides that a fatwa becomes law and only has the force of law upon *gazetting* and a provision on the procedure of making a fatwa is articulated in s 48. Under s 49, it further provides on how a fatwa becomes law and binding on the Muslim when it says:

49(1) Upon its publication or being informed, a fatwa shall be binding on every Muslim in the State of Johor as a dictate of his religion and it shall be his religious duty to abide by and uphold the fatwa, unless he is first permitted by the Fatwa Committee to depart from the fatwa in accordance with Hukum Syarak.

(2) A fatwa shall be recognised by all courts in the State of Johor of all matters laid down therein.

[36] Further, in para 85 of the same, the court remarked that:

[85] Thus, in imposing the fatwa of the National Fatwa Committee without adhering to s 52, the DGNR had, therefore, usurped the power or the authority given to the Fatwa Committee of Johor in the imposition of 'bin Abdullah' on the first respondent.

[37] Similarly in our instant application, the *fatwa* that the respondent relied on, the Naming an Illegitimate Child was *gazetted* on the 18 February 2021 which has effect from 1 of February 2021. The fatwa is reproduced as follows:

MAJLIS ISLAM SARAWAK ORDINANCE, 2001

FATWA ON THE NAMING OF ILLEGITIMATE CHILD

(Made under section 37)

In exercise of the powers conferred by section 37 of the Majlis Islam Sarawak Ordinance, 2001 [Cap. 41], the Majlis Islam Sarawak, upon the concurrence of the Yang di-Pertua Negeri, has made the following Fatwa:

Citation and Commencement

1. This Fatwa may be cited as the *Fatwa on the Naming of Illegitimate Child*, and shall be deemed to have come into force on the 1st day of February, 2021.

Interpretation

2. In this fatwa, unless the contexts otherwise requires —

'illegitimate' in a relation to a child, means a child that is born out of wedlock and not a child born from a syubhah intercourse;

'syubhah intercourse' means intercourse performed on erroneous impression that the marriage was valid when in fact it was not valid (fasid) or intercourse by mistake and includes any intercourse not punishable by Had in Islam;

'nasab/lineage' means descent based on lawful blood relationship;

'child' means a person that is not married under the age of eighteen years old.

Naming of Illegitimate Child

3(1) Illegitimate child that is born must be given the name of Abdullah, which means 'servant of Allah', after the said child's name.

(2) If the man that caused the birth of the child is named Abdullah, the child should be named Abdul and followed by the name of 'al-Asma al-Husna' i.e. Abdul Rahman or Abdul Rahim after the said child's name.

(3) Naming that is ALLOWED are as follows —

No.	EXAMPLE	
	Male	Female
1.	Ahmad Bin Abdullah	Azizah Binti Abdullah
2.	Ahmad Bin Abdul Rahman (The father's name should be Abdul followed by the name of 'al-Asma al-Husna')	Azizah Binti Abdul Rahman (The father's name should be Abdul followed by the name of 'al-Asma al-Husna')

Adoption of Illegitimate Child

4(1) Any illegitimate child that is adopted by any person should be given the name of Abdullah, which means 'servant of Allah', after the child's name.

(2) If a man who adopts the said child is also named Abdullah, the said child should be named Abdul and followed by the name of 'al-Asma al-Husna' i.e. Abdul Rahman or Abdul Rahim after the child's name.

(3) The name of the adoptive father or guardian or the father that caused the birth of the illegitimate child (or any other name which has the spelling that closely resembles its spelling) shall not be a part of adopted child's name or the adopted child's last name.

(4) Naming for adoption of illegitimate child are as follows —

Matter	Male Name	Female Name
Name of Child	Faiz	Tasnim
Name of Adoptive Father	Amir	Amir

Naming that is *ALLOWED* are as follows —

No.	Male	Female
1	Faiz Bin Abdullah	Tasnim Binti Abdullah

Naming that *NOT ALLOWED* are as follows —

No.	Male	Female
1	Faiz Bin Abdullah	Tasnim Binti Abdullah
2	Faiz Amir Abdullah	Tasnim Amir Abdullah
3	Faiz Amir Bin Abdullah	Tasnim Amir Binti Abdullah
4	Faiz Bin Amir Abdullah	Tasnim Binti Amir Abdullah
5	Faiz Bin Abdullah Amir	Tasnim Binti Abdullah Amir
6	Faiz Abdullah Bin Amir	Tasnim Abdullah Binti Amir
7	Amir Faiz Bin Abdullah Amir	Tasnim Binti Abdullah
8	Amir Faiz Abdullah	Amir Tasnim Abdullah

Conclusion

5. It is hoped that this fatwa can be used as a reference to all Muslims in resolving issues related to the naming of illegitimate children based on Islamic law.

Dated this 18th day of February, 2021.

[38] Further, s 37(4) and (5) of the Majlis Islam Ordinance which reads that a fatwa will be binding on all Muslims from the date specified in the *Gazette* notification:

(4) Upon the concurrence of the Yang Di-Pertua Negeri being obtained for the issue of the fatwa, the State Secretary shall cause the fatwa to be published in the *Gazette*, whereupon the fatwa, shall, *as from the date specified in the Gazette notification,* be binding on all Muslims in the State.

(5)(a) A fatwa shall from the date referred to in subsection (4) be recognized by all courts in the State as conclusive of the matters laid down therein.

(b) In proceedings before any court, *the production of the Gazette notification*

published pursuant to subsection (4) shall be conclusive evidence of the fatwa contained therein.

[39] The AAS submits that it will be in the best interest for this High Court to seek for detailed and expert opinion of Syariah lawyers on the Islamic Law to resolve some of the substantive issues arising from this application (encl 19).

[40] An observation may be made by FCJ Azahar bin Mohamed in the recent case *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 where a decision relating to the 'hukum syarak' is concerned, the court may call in experts in the religion of Islam to give evidence or refer the questions to the Fatwa Committee for certainty, however the opinion does not bind the civil court. The finality of the matter still remains with the court:

> [161] Nevertheless, the opinion does not bind the civil court. It is therefore for the court to decide whether to accept the expert evidence or otherwise. The opinion should be considered and serves as guiding principles. The final decision of the matter remains with the court. The opinion is relevant only in so far as it can assist the court in forming an opinion upon the issue in this case.

[41] In essence, any opinion expressed by the respondent's counsel in relation to religious matter shall and only be taken into consideration and will not bind the court.

[42] The *fatwa* that the respondent relied on, the *Fatwa on Naming Illegitimate Child* made under s 37 of the Majlis Islam Ordinance 2001 (Cap 41) was *gazetted* on the 24 February 2021, and shall be deemed to have come into force with effect from 1 February 2021 (see para 36).

[43] The issue then arises as to whether this nature of fatwah has retrospective effect. The Court of Appeal's decision in *Syed Ibrahim Bin Syed Mohd & Ors v Esso Production Malaysia Incorporated* [2004] 2 MLJ 49 at para 22 provided that a retrospective law would only be applicable to procedural matter but not to a right a person:

> [22] ... As such to consider whether a subsidiary legislation with retrospective effect is void or otherwise, a distinction should be made whether that subsidiary legislation affects a procedural matter or a right. If it affects a procedural matter then it would be effective on the date appointed but then a procedural matter could become a right as illustrated in the authorities above and *once it becomes a right it could not be taken away retrospectively.*

[44] In addition, the court made further observation on the power of the Minister to create subsidiary legislation with regard to retrospective effect.

> [30] ... a person is empowered to make subsidiary legislation only when the parent

Act *provides the person with such power.* For that subsidiary legislation to have retrospective effect the parent Act *must also provide that person to make the subsidiary legislation with retrospective effect.*

[45] Further, the Federal Court in *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311; [2020] 1 CLJ 193 held that a statute should not be interpreted retrospectively so as to impair an existing substantive right or obligation.

[46] Reading the Majlis Islam Ordinance (Cap 41) as a whole, nothing suggests that the Majlis is empowered to issue a *fatwa* with retrospective effect. Hence, the recently *gazetted* fatwa, could not be said to have retrospective effect.

[47] In any event, s 37(4) of the Majlis Islam Ordinance stipulates that the *fatwa* shall be binding on all Muslim in the state from the date specified in the *gazette* notification (see para 37 above).

[48] Henceforth, the *gazetted fatwa* shall and will only bind the naming of an illegitimate child for an application after the *gazetted fatwa* has come into force. The current application commenced on the 16 January 2020 (encl 1) which was over a year before the *Fatwa on Naming an Illegitimate Child* was *gazetted* into effect.

[49] In the premises, the respondent has erred in enforcing the *ungazetted fatwa* by adding 'BIN ABDULLAH' to the child's name by reason of his adoption.

Welfare of the child

[50] Article 3(1) of the United Nations Convention on Rights of the Child ('UNCRC') reads:

> 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*
>
> (2). States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account *the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

[51] The UNCRC came into force in 1989 and is one of the nine main human right treaties. Malaysia ratified the UNCRC on February 17,1995 and enacted the Child Act 2001 [Act 611] as part of her commitment to the

UNCRC. See the paper by *Dr Salahudin bin Dato' Hidayat Shariff* at p 145 et seq of the *Journal of the Malaysian Judiciary; January [2021] — 'The Best Interests of the Child Principle in England and Malaysia*', extracted with gratitude.

[52] The applicability of International Conventions or Treaties does not pose as unfamiliar to High Court, as it can be seen in *Noorfadila bt Ahmad Saikin v Chayed bin Basirun & Oors* [2012] 1 MLJ 832, where Zaleha Yusof J ruled that the untrained teacher was indeed discriminated and applied the United Nations Convention in Elimination of All Forms of Discrimination against Women of which Malaysia has been a signatory to since 1995.

[53] Having no specific reference provided under the Malaysian law and having regard to article 3 of the UNCRC, it is in the best interests of the child that his welfare is being placed of paramount consideration.

[54] Furthermore, as pointed out in his dissenting judgment, Tan Sri Datuk David Wong Dak Wah CJSS in *Jabatan Pendaftaran Negara,* the effect of 'bin Abdullah' in the name of the child is discriminatory in nature and brings no good but harm to the adopted Child, and is against the fundamental liberties guaranteed under the supreme law of the land:

> [195] The inclusion of 'bin Abdullah' is discriminatory because it informs the entire world that the child is an illegitimate child. This type of discrimination is not sanctioned by article 8(1) of the Federal Constitution as it bears no legitimate nexus to the reason for the discrimination.
>
> [204] It is my view that it will lead to serious and unjust repercussions to any child's emotional well-being and future. It is patently clear that the child is not responsible for the circumstances he or she finds himself or herself in and when the law allows the child to bear such stigma, it is a law which does not have the best interest of the child. *The best interest of children must be the primary concern in all laws, policies and decisions affecting them.* Their right to be known as a member of the family should not be taken away. This is not an emotional argument but a due recognition that such rights are constitutional rights.

[55] I have no doubt that the child in this application is still a 'child' as, being born in 2018, he has not attained the age of majority and has clearly not attained the age of maturity as defined under Islamic law. Quoting Dr Salahudin in January [2021] JMJ, at para [19]:

> The Organization of Islamic Conference came together and drafted the Covenant on the Rights of the Child in Islam ('the Covenant') seemingly in response to the UNCRC. The Covenant defines the child as, every human being who, according to the law applicable to him/her, has not attained maturity.

[56] What is the, 'best interests of the child' in this case? As always, the interest of the child must be looked at in the circumstances of each case in particular, as in this case, the child's future upbringing in an Islamic household.

[57] However the strongest and clearest expression of what is the child's best interest is the intention expressed by the child's parents. They have expressed this intention in this application as parents, they have the first right to decide what is in the best interest of the child. This is so as they are now both legally and morally responsible for this Child and his welfare, emotions, health, education and generally, his upbringing.

[58] Yang Arif Lee Swee Seng in the case of *Thivya Nair Chandran & Anor v Pusphalatha Surandran & Anor* [2015] 2 CLJ 408 emphasised that:

> In any dispute involving a child, the law leans to protect the child and the overriding consideration is always what would be in the best interest of the child. No one would doubt the wisdom of such universal principle of law.

THE STAND TAKEN BY AAS AS AMICUS CURIAE

[59] In a nutshell the AAS weighted in favour of the requirement to abide by the fatwah. That it was unsafe to grant an order in terms to the current application, for more reasons than one. Due consideration has to be accorded to the possible application of Islamic law principles on the facts. At the same time they were aware of the need to do right by the child by offering the child a life free from stigmatisation of our society which the ascription (under the Islamic laws) would undoubtedly cast in the event it is not deleted from the Special Register, the Certificate of Adoption and the Birth Certificate.

[60] Excerpts from their submission included the following:

> As a matter of fact, the AAS takes the view that the deletion sought for by the applicants is tantamount to a challenge against the decision of the District Officer in charge in including the name 'bin Abdullah' in the name of the said Child. By deletion of the ascription, there is a possibility that the applicants may essentially be seeking to change the illegitimate status of the said Child, i.e. to legitimize an illegitimate child through a proper and valid adoption January 8. We are of the opinion that whether the applicants are seeking to do so would need to be determined by this Court as one of the substantive issues
>
> We are of the opinion that the Adoption Ordinance does provide the authority to the District Officer, be it to remove from or to add to the register the ascription of 'bin Abdullah' which was given the said Child at the time of his birth in accordance to the principles of Islamic Law after the said Child was adopted by new adoptive parents. As such, based on the current facts, in the event the District Officer is cloaked with the authority to do so, the ascription could not have been a mistake or an oversight of any sort.

Be that as it may, we are aware of the legal principle ensconced in the Latin maxim generalia specialibus derogant' whereby special provisions or special statute will exclude the operation of the general law or statute, which we deal with below.

The maxim may be construed in light of Section 4 of Adoption Ordinance of Sarawak which comes complete with its own statutory device for amendment in the form of Section 4(4)(a) & (b) which are drafted in the negative, thereby expressly prohibiting any other manner of 'variation, amendment and alteration' except by application by way of Originating Summons to High Court judge for such Order, and the Rules of Court relating to application by Originating Summons shall apply

However, Sections 10 and 11 of the Syariah Courts Ordinance 2001, being a state legislation, did not specify that adoption is within the jurisdiction of the Syariah Court. Arguably, in the Sarawak context, this creates a grey area we shall leave it to this Honourable Court to decide.

This is supported by the authority of *Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner for Reigious Affairs, Terengganu & Ors* [1969] 1 MLJ 110, where the High Court judge was of the view that even if the civil court had sought a fatwa, the civil court retained unfettered discretion as to how much of such fatwa it should accept, and may decline to be bound by it.

[61] The AAS also strongly recommended that this court first procures an expert opinion on the applicability of the fatwah in this case before coming to its decision. However, I do not wish to prolong this matter any further. I would encourage the AAS to so procure such opinion in case similar applications of this nature arise in future. The relevant Syariah council can then render their opinion in the light of this judicial pronouncement.

[62] In the premises, taking into account the overriding principle in cases involving a child or minor is that the 'best interests of the child' is a paramount consideration (see paras 48–56 above):

(a) the UNCRC which Malaysia has adopted;

(b) part of the reasoning of the dissenting judgment of Tan Sri David Wong, the then Chief Judge of Sabah and Sarawak (see para 52 above);

(c) that Child A bin Abdullah *is* a child;

(d) that the *Fatwah* had not been *gazetted* when the child was named by the respondent and when this originating summons was filed;

(e) the terms and intention of the *fatwah* even though not *gazetted*;

(f) the application by the applicants in encl 1 represents their belief, as parents of the child, as to what is the best interests of the child;

(g) the applicants are the lawful parents of the child who profess the Muslim faith and who decided to proceed with this Application even after being made aware of the existence of the *fatwah;*

(h) that under art 8(1) of the Federal Constitution — 'All persons are equal before the law and entitled to equal protection of the law'; and

(i) the Guiding Principle for the Adoption Ordinance enunciated in s 2(2) of the Ordinance (emphasis added), which in my view supports the 'best interests of the child' principle, — '*Such adopted child shall stand in the same relation to the adopting parent or parents as would a child born in wedlock and shall have all the rights and privileges of a legitimate child in respect of the obligations and estate of the adopting parents'.*

[63] I rule that: firstly, it is sufficiently well established in Malaysia that the universal principle of the best interests of the child should prevail in cases such as this; secondly, a child should not be punished for his choice of his parents, whether biological or adoptive. It is not in the child's best interest to grow up, go to school, socialise and then go to work carrying a stigma that he was either illegitimate or adopted. He has committed no sin to justify such lifetime of social, emotional and psychological punishment. Such a label would also deprive him of his fundamental right of being equal in the eyes of the law under art 8(1) of the Federal Constitution.

[64] While I agree that the respondent or District Officer, Sibu decision was not tainted with any illegality, mistake and he has not committed any error of judgment or discretion, this case is decided on other considerations, primarily the overriding principle of the best interest of the child as perceived by his parents.

[65] All facts peculiar to this case must be considered in determining what is in the best interest of the child. The *Fatwah,* even if not *gazetted* at the relevant time, is only one of such facts. In this case the wishes of the parents of the child, who are the applicants, are given serious consideration as they are the parent of the child.

CONCLUSION

[66] I order that the child should be named as intended by his parents. I allow the terms prayed for by the applicants in encl 1. Therefore:

(a) the District Officer, Sibu and the Jabatan Pendaftar Negara is to forthwith amend the name of the child in the special register, Certificate of Adoption and Birth Certificate of the child from:

CHILD A BIN ABDULLAH

To

CHILD A in accordance to the wishes of his parents; and

(b) I make no order as to costs.

Application allowed.

Reported by Izzat Fauzan